



State of Ohio Environmental Protection Agency

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February 21, 2008

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Mr. Kenneth S. Komoroski, Esq.  
Kirkpatrick & Lockhart Preston Gates Ellis LLP  
Henry W. Oliver Building  
535 Smithfield Street  
Pittsburgh, Pennsylvania 15222-2312

Re: Wheeling Pittsburgh Steel Corporation: VAP Eligibility;  
Martins Ferry, Mingo Junction, Steubenville and Yorkville, Ohio

Dear Mr. Komoroski:

This letter follows my receipt of a copy of a letter from Mr. Bud E. Smith, Wheeling Pittsburgh Steel Corporation ("WPSC"), to Ms. Amy Yersavich, Ohio EPA, dated August 31, 2007, together with documentation intended to supplement the "Notice of Entry into the VAP MOA Track" submitted by WPSC to Ohio EPA at a meeting on August 2, 2007. The purpose of my letter is to notify you, as counsel for WPSC that, in my opinion, the WPSC plants in Martins Ferry, Mingo Junction, Steubenville and Yorkville, Ohio ("Plants") are not eligible to participate in the Voluntary Action Program ("VAP") pursuant to Ohio Revised Code ("ORC") § 3746.02, Ohio Administrative Code ("OAC") rule 3745-300-02, and the July 31, 2001 Memorandum of Agreement between Ohio EPA and US EPA, as amended, as well as the November 2007 Memorandum of Agreement.

ORC section 3746.02(A) identifies the types of properties that are ineligible for the VAP; OAC rule 3745-300-02(C) specifies the 8 categories of properties that are ineligible for the VAP:

- property identified on the National Priorities List;
- property subject to requirements for assessment, removal or remediation of underground injection control wells;
- property subject to requirements for corrective action pursuant to a federal or state RCRA permit;
- property subject to a federal enforcement action that requires assessment, removal or remedial activities;
- property where closure of a solid or hazardous waste facility is required;

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- property subject to assessment, removal or remediation of petroleum underground storage tanks;
- property subject to assessment, removal or remediation of oil and gas wells; and
- property subject to state enforcement regarding a release or threatened release of hazardous substances or petroleum which poses a substantial threat to public health or safety or the environment.

WPSC's submittal included four documents entitled, "Initial Eligibility Determination," one for each plant. Each document indicated that the plant is not the subject of a federal enforcement action requiring site assessment, removal, or remedial activities, pursuant to federal laws and regulations.

However, my review also included an October 30, 2007 letter from U.S. EPA Region 5 to Ohio EPA (copy enclosed), which summarizes Region 5's "serious concerns about the likelihood of an appropriate course of response action occurring on an acceptable time frame under a voluntary action at these facilities." In addition, my review included your May 11, 2007 letter to Regional Counsel, which summarized WPSC's perspective regarding a dispute with Region 5 regarding access by US EPA's contract inspectors to the Yorkville plant in April 2007, and Ms. Pamela Lee's June 26, 2007 letter to you, in which DOJ "terminated" negotiations regarding "various environmental violations at WPSC facilities," due to "significant disagreement regarding certain issues – particularly with regard to matters raised under [RCRA,] and concluded that the issues would be addressed "through more traditional means."

### **Background**

OAC rule 3745-300-02 (C) (4) declares ineligible "[a]ny property that is the subject of a federal enforcement action which requires site assessment, removal or remedial activities pursuant to any federal laws and regulations, including [CERCLA and the NCP]." See also ORC § 3746.02(A)(1)(d).

The October 30<sup>th</sup> letter from U.S. EPA Region 5 to Ohio EPA states that beginning in 2000, Region 5, OECA, DOJ, Ohio EPA and the AGO discussed "the resolution of violations discovered during multi-media inspections in 1999, including the potential release of coke oven gas condensate from a gas pipeline and associated tanks at the Steubenville and Mingo Junction facilities, and releases from out-of-service 'Arco' ductwork . . . at the Martins Ferry plant." The letter also explains that in April 2006, Region 5 and Ohio EPA "hazardous waste enforcement staff conducted unannounced inspections at WPSC's facilities and learned that the coke oven gas line had been temporarily shut down, but no remediation had been performed on the surrounding soils." The letter further states that in November 2006, Ohio EPA proposed that Region 5 serve as the lead agency for corrective

action at these four facilities; "Region 5 agreed and began gathering information about [SWMUs] and other [AOCs] as an antecedent to seeking RCRA corrective action or other remedial work."

"Accordingly, U.S. EPA Region 5 developed information requests for each of the four facilities as part of the [PA/VIS] process, in order to gather information about areas where solid waste may have been managed, hazardous wastes or hazardous waste constituents released, and other potential areas of concern." The October 30<sup>th</sup> letter also summarizes a dispute with WPSC regarding access by US EPA's contract inspectors to the Yorkville plant in April 2007.

The October 30<sup>th</sup> letter notes that "[d]ue to the timing of the contract and denial of access to the facilities by WPSC the PA/VI process has not been completed. However, the information U.S. EPA Region 5's contractor has reviewed indicates the presence of numerous areas at all four facilities that would properly be the subject of investigation, sampling and/or monitoring and, if appropriate, remediation, through the exercise of RCRA corrective action authority, the authority granted in RCRA Sections 3013 and 7003, or other federal statutory [authority]."

By letter dated, June 26, 2007, DOJ "terminated" negotiations regarding "various environmental violations at WPSC facilities," due to "significant disagreement regarding certain issues – particularly with regard to matters raised under [RCRA,] and concluded that the issues would be addressed "through more traditional means." The October 30<sup>th</sup> letter concludes that Region 5:

- believes that the history of Ohio EPA and US EPA involvement with WPSC at these four facilities would support Region 5's continued actions to characterize the facilities' conditions and, if necessary, oversee their clean-up;
- views WPSC's participation in the VAP as inappropriate under the terms of the VAP MOA, since other similarly-situated facilities have been subject to closure requirements and site-wide corrective action, making the likelihood of taking such an action at one or more of these facilities likely; and
- believes that these four WPSC facilities are the subject of both hazardous waste closure requirements and corrective action requirements under RCRA, which under the terms of the Ohio MOA and Ohio's VAP rules, would render the facilities ineligible for participation in the VAP.

Your May 11, 2007 letter to Regional Counsel summarizes WPSC's perspective regarding the dispute with Region 5 regarding access by US EPA's contract inspectors to the Yorkville plant in April 2007. Your letter: states that none of the Plants has a RCRA permit or "interim status" designation; maintains "WPSC's status as a generator of hazardous wastes;" and objects to the propriety of commencing a RCRA corrective action investigation.

I. The Plants are presently ineligible for the VAP

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In my opinion, the Plants are the “subject of a federal enforcement action which requires site assessment, removal or remedial activities pursuant to [ ] federal laws and regulations, including [RCRA].” OAC rule 3745-300-02(C)(4).<sup>1</sup> The rule states that “[f]or purposes of this paragraph, ‘federal enforcement action’ includes but is not limited to the issuance of administrative or judicial orders, injunctions, and consent decrees.” *Id.* (emphasis added). This means that an enforcement investigation, i.e., the preliminary stages of an enforcement action that could [but does not necessarily] result in an administrative or judicial order, injunction or decree, is an “enforcement action” for purposes of this paragraph of the VAP eligibility rule. There is no question that US EPA Region 5 is engaged in an enforcement investigation of the Plants that “requires site assessment” activities under RCRA. Accordingly, the Plants are “subject to federal enforcement” under OAC rule 3745-300-02(C)(4). Thus, the Plants are ineligible for the VAP at this time.

## II. The Plants would have been ineligible for the VAP MOA Track under the 2001 MOA

The Plants would have been ineligible for the MOA Track of the VAP under the July 31, 2001 Memorandum of Agreement; Section IV, Applicability, provided, in part:

This Agreement applies to Brownfields that meet all of the following criteria:

...

D. Are not any of the following:

...

- Subject to federal enforcement or response action under RCRA or CERCLA, including but not limited to administrative or judicial orders, permits, injunctions and consent decrees;

...

Superfund MOA, pages 3-4.<sup>2</sup> As stated above, an enforcement investigation, i.e., the preliminary stages of an enforcement action that could [but does not necessarily] result in an administrative or judicial order, injunction or decree, is an “enforcement or response action” for purposes of this paragraph of the 2001 MOA. There is no question that US EPA Region 5 is engaged in a RCRA

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<sup>1</sup> The October 30<sup>th</sup> letter also suggests that the Plants are subject to “hazardous waste closure requirements” under RCRA and therefore are ineligible for the VAP. However, there is insufficient information available to me at this time to provide an opinion on whether the Plants are ineligible for the VAP under OAC rule 3745-300-02(C)(5).

<sup>2</sup> The July 31, 2001 MOA also provided that brownfields were ineligible if they were “subject to RCRA Corrective Action via a state or federal permit, order, or agreement (including interim status facilities), as provided in OAC Chapter 3745-55.” However, according to your May 11, 2007 letter to Regional Counsel, none of the Plants has a RCRA permit or “interim status” designation. And the October 30<sup>th</sup> letter makes no mention of an order or agreement for corrective action. Indeed, you have insisted that WPSC is merely a “generator of hazardous wastes,” and have objected to the propriety of a RCRA corrective action investigation.

enforcement investigation of the Plants. Accordingly, the Plants are “subject to federal enforcement or response action under RCRA,” per Section IV, Paragraph D of the 2001 MOA.

Since the Plants are “subject to federal enforcement or response action under RCRA,” they would have been ineligible for the MOA Track of the VAP under the 2001 MOA.<sup>3</sup>

### III. The Plants are ineligible for the VAP MOA Track under the 2007 MOA

The Plants are ineligible for the MOA Track of the VAP under the Memorandum of Agreement signed by the Director of Ohio EPA on November 5, 2007 and signed by US EPA Regional Administrator Mary Gade on November 8, 2007. Section I.B., Applicability, of the 2007 MOA, provides:

2) This MOA does not apply to sites or facilities that are:

...

d) the subject of federal enforcement or response action under RCRA or CERCLA, including but not limited to an administrative order, a judicial order, a permit, an injunction, a consent decree, or a CERCLA general or special notice letter;

...

2007 MOA, page 2.<sup>4</sup> As stated above, an enforcement investigation, i.e., the preliminary stages of an enforcement action that could [but does not necessarily] result in an administrative or judicial order, injunction or decree, is an “enforcement or response action” for purposes of this paragraph of the 2007 MOA. There is no question that US EPA Region 5 is engaged in a RCRA enforcement investigation of the Plants. Accordingly, the Plants are “the subject of federal enforcement or response action under RCRA,” per Section I.B, Paragraph 2)d) of the 2007 MOA.

Since the Plants are “the subject of federal enforcement or response action under RCRA,” they are ineligible for the MOA Track of the VAP under the 2007 MOA.

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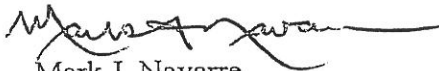
<sup>3</sup> The November 2007 MOA “replace[d] and supersede[d] the July 31, 2001 Superfund MOA, as amended on July 24, 2004 and February 13, 2006.” 2007 MOA, page 1.

<sup>4</sup> The 2007 MOA also provides that brownfields would be ineligible if they are “e) subject to RCRA corrective action via a state or federal permit, order, or agreement (not including interim status facilities unless required to perform corrective action under a permit, order or agreement) under RCRA or ORC Chapter 3734 and rules adopted thereunder, i.e., OAC Chapter 3745-55.” However, see footnote 2.

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This eligibility opinion does not constitute a final action of the Director, and does not establish an attorney-client or consultant-client relationship. This opinion is based upon the information referenced herein, and therefore may not be accurate if actual facts or circumstances vary from those represented. Should you have any questions in this regard, please feel free to contact me at your convenience, (614) 644-3037.

Sincerely,



Mark J. Navarre  
Supervising Attorney

enclosure (1)

cc: Amy Yersavich, VAP/DERR/CO  
Ken Dewey, DERR/SEDO